

MT LEGISLATIVE HISTORY

Chapter 13 1961

Bill H 86 S _____

Original bill & hist. C

H. Committee on Judiciary

S. Committee on Judiciary

Hearing Date(s) Jan 16 ✓ C

Hearing Date(s) Jan 27 ✓ C

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Date Out Jan 16 ✓ C

Jan 27 ✓ C

Did this bill originate in an interim committee? Yes No

Committee _____

Report _____

Senate Bill #67 - Referred to Constitution, Elections and Federal Relations Committee.

Senate Bill #135 - Senator McKeon reported on this bill. McKenna made a motion that this bill do not pass, seconded by Cumming. Motion carried and so ordered.

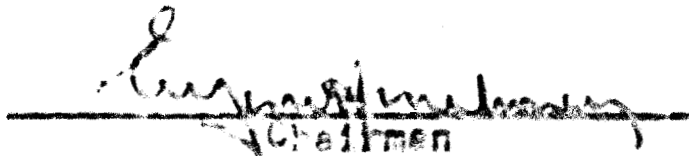
Senate Bill #133 - Chairman Mahoney read the bill and a discussion followed. Senator Gross called to appear and report on the amount of money involved. Dussault moved that this bill do pass. Seconded by Cumming. Motion carried and so ordered.

Senate Bill #103 - Senator McKeon explains and relates to the committee the amendments to be made. McDonnell moved that the amendments be adopted. Seconded by Cumming. Motion carried. Cumming moved that the bill as amended do pass. Dussault seconded the motion. Motion carried.

Senate Bill #149 - McKeon recommended that this bill do
not pass and that was seconded by Harken.
Motion carried and so ordered.

House Bill #86 - McKeon made the motion that this bill be concurred in and Dussault seconded it. Motion carried and so ordered.

No further business Cumming made the motion that the committee adjourn. Grieve seconded the motion. Meeting adjourned at 5:00 P.M.


Chairman

House Bill No. 71 was then taken up. Motion was made by Dykstra and seconded by Blewett that House Bill No. 71 be re-referred to Committee on Public Health, Welfare & Safety. Motion carried.

House Bill No. 80 was considered. Motion was made by Bradford and seconded by Conklin that House Bill No. 80 Do Pass. Motion was withdrawn. Motion was made by Bradford and seconded by Conklin that House Bill No. 80 Do Not Pass. but that Substitute House Bill No. 80 be introduced by Committee on Judiciary eliminating Section 1 in its entirety and that Substitute House Bill No. 80 Do Pass. Motion carried.

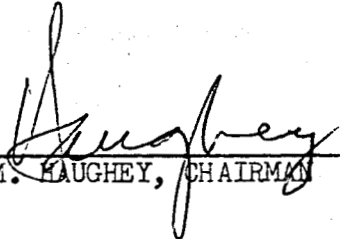
House Bill No. 86 was considered at this time. Motion was made by Blewett and seconded by Dykstra that House Bill No. 86 Do Pass. Motion carried.

House Bill No. 123 was considered. Motion was made by Lucas and seconded by Dykstra that House Bill No. 123 Do Pass. Motion carried.

Mr. Blewett explained a bill that he would like have introduced as a committee bill. After brief discussion it was decided that action be deferred on this.

Motion was made by Lucas and seconded by Murray that the meeting be adjourned.

Meeting adjourned.



JAMES M. HAUGHEY, CHAIRMAN

CHAPTER 11

An Act to Amend Section 16-1706 of the Revised Codes of Montana, 1947, Relating to Noxious Weed Control, to Provide for Encompassing State Institutional and Custodial Lands Within the Purview of the Weed Control Law; and Providing a Repealing Clause.

Be it enacted by the Legislative Assembly of the State of Montana:

Amending clause.

Section 1. That section 16-1706 of the Revised Codes of Montana, 1947, be, and the same is hereby amended to read as follows:

Wilfully
permitting
noxious weeds to
seed unlawful.

"16-1706. **Wilfully permitting noxious weeds to go to seed unlawful.** It shall be unlawful to *wilfully* permit any noxious weed, as named in this act, or designated by the board of county commissioners of the respective county, to go to seed on any lands within the areas of any district. This section shall apply to all persons, co-partnerships, corporation, or companies owning, occupying or controlling lands, easements, or right-of-ways, as well as all county, state and federal owned and controlled highways, *state lands*; also all drainage and irrigation ditches, spoil banks, borrow pits and right-of-ways for canals and laterals within the district."

Repealing clause.

Section 2. All acts or parts of acts in conflict herewith are hereby repealed.

Approved February 6, 1961.

CHAPTER 12

An Act to Amend Section 26-302 of the Revised Codes of Montana, 1947, Relating to Requirement that Big Game Hunters Must Wear Colored Clothing, to Provide That Big Game Hunters May Wear Red, Orange or Yellow Color on Clothing; and Containing a Repealing Clause.

Be it enacted by the Legislative Assembly of the State of Montana:

Amending clause.

Section 1. Section 26-302 of the Revised Codes of Montana, 1947, be amended to read as follows:

Big game hunters
to wear colored
garments.

"Section 26-302. **Big game hunters to wear colored garments.** It shall be unlawful for any person to hunt any of the big game animals in this state under any of

the provisions of the laws of this state without such person wearing *as an exterior garment*, a cap or hat, shirt jacket, coat or sweater of a bright red, *orange or yellow color*."

Section 2. All acts or parts of acts in conflict herewith are hereby repealed. Repealing clause.

Approved February 6, 1961.

CHAPTER 13

An Act Providing for the Codification and General Revision of the Laws Relating to Rules of Pleading; Practice and Procedure in Civil Cases in the Courts of the State of Montana for the Purpose of Simplifying Judicial Proceedings and Promoting the Speedy Determination of Litigation Upon Its Merits; Providing for an Effective Date of This Act; Repealing the following Sections of the Revised Codes of Montana, 1947: Section 93-2303; Section 93-2801; Section 93-2805; Section 93-2811; Section 93-2812; Section 93-2816; Section 93-2818; Section 93-2821; Section 93-2822; Sections 93-2824 Through 93-2826; Section 93-2828; Section 93-2905; Section 93-3003; Section 93-3006; Section 93-3007; Sections 93-3013 Through 93-3015; Section 93-3017; Section 93-3018; Sections 93-3101 Through 93-3103; Sections 93-3201 Through 93-3203; Sections 93-3301 Through 93-3306; Section 93-3401; Section 93-3402; Section 93-3404; Section 93-3405; Section 93-3408; Sections 93-3410 Through 93-3412; Section 93-3415; Sections 93-3501 Through 93-3506; Sections 93-3601 Through 93-3604; Section 93-3701; Sections 93-3801 Through 93-3803; Sections 93-3806 Through 93-3808; Sections 93-3811 Through 93-3813; Sections 93-3815 Through 93-3819; Section 93-3820 as Amended by Chapter 16, Laws of 1953; Sections 93-3901 Through 93-3905; Section 93-3907; Section 93-3909; Section 93-4120; Section 93-4701; Sections 93-4703 Through 93-4705; Section 93-4708; Section 93-4709; Section 93-4801; Section 93-4902; Section 93-4904; Section 93-4905 as Amended by Chapter 84, Laws of 1949; Section 93-4906; Section 93-4908; Section 4909; Sections 93-5012 Through 93-5014; Subsection (5) of Section 93-5101; Section 93-5111; Section 93-5201; Section 93-5202; Section 93-5301;

Section 93-5303; Sections 93-5401 Through 93-5403; Sections 93-5405 Through 93-5407; Sections 93-5410 Through 93-5412; Section 93-5502; Section 93-5605; Section 93-5701; Section 93-5703; Section 93-8007 as Amended by Chapter 75, Laws of 1959; Sections 93-8008 Through 93-8010; Section 93-8201; Section 93-8301; Section 93-8401; Section 93-8403; Sections 93-8501 Through 93-8504; Section 93-8507; Section 93-8607; Section 93-8705; Section 93-1501-5; Sections 93-1801-1 Through 93-1801-3; Section 93-1801-4 as Amended by Chapter 9, Laws of 1953; Sections 93-1801-5 Through 93-1801-16; Section 93-1901-9; Sections 93-2301-1 Through 93-2301-7; Repealing All Acts and Parts of Acts in Conflict Herewith.

Be it enacted by the Legislative Assembly of the State of Montana:

CHAPTER 1. SCOPE OF RULES — ONE FORM OF ACTION

Scope of rules.

Section 1. Rule 1. Scope of rules.

These rules govern the procedure in the district courts of the State of Montana in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81; provided, however, that the discovery procedures set forth in Rules 26 through 37, inclusive, shall be applicable to proceedings in probate. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

One form of action.

Section 2. Rule 2. One form of action.

There shall be one form of action to be known as "Civil Action."

CHAPTER 2. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS.

Commencement of action.

Section 3. Rule 3. Commencement of action.

A civil action is commenced by filing a complaint with the court.

Section 4. Rule 4. Persons subject to jurisdiction; process; service.

Definition of person.

A. *Definition of Person.* As used in this rule, the word "person", whether or not a citizen or resident of

this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

B. (1) *Subject to Jurisdiction.* All persons found within the State of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through an employee, or through an agent, of any of the following acts:

Subject to jurisdiction.

- (a) the transaction of any business within this state;
- (b) the commission of any act which results in accrual within this state of a tort action;
- (c) the ownership, use, or possession of any property, or of any interest therein, situated within this state;
- (d) contracting to insure any person, property, or risk located within this state at the time of contracting;
- (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
- (f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within, this state, or as executor or administrator of any estate within this state.

(2) *Acquisition of Jurisdiction.* Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

Jurisdiction acquired.

C. *Process.*

(1) *Summons: Issuance.* Upon the filing of the complaint, the clerk shall forthwith issue a summons, and

Summons—issuance.

shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

Form.

(2) *Same: Form.* The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

D. Service.

By whom served.

(1) *By Whom Served.* Service of all process shall be made by a sheriff of the county where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of 21 not a party to the action, except that a subpoena may be served as provided in Rule 45.

Personal service within state.

(2) *Personal Service Within the State.* The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by de-

livering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian *ad litem* for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation or upon a partnership or other unincorporated association, by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the domestic corporation, partnership, or unincorporated association within this state with the person in charge of such office. If the suit is against a corporation whose charter or right

to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members, and if none such can be found, service may be made upon the secretary of state.

(f) Upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the cause of action accrued, (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate, or attorney for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the charter of the foreign corporation, or its right to do business, has expired or been forfeited, by delivering a copy of the summons and complaint to one of the persons who have become trustees for the corporation and its stockholders or members, if such can be found in Montana.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(3) *Personal Service Outside the State.* Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and com-

Personal service
outside state.

plaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service of summons by publication is permitted as hereinafter provided, personal service of the summons and complaint upon the defendant out of the state, made after the filing of the required complaint and required affidavit for publication, shall be equivalent to, and shall have the same force and effect as, the publication and mailing provided for hereafter in 5(d) and 5(e) of this rule.

(4) *Other Service.* Whenever a statute of this state or an order of the court made pursuant thereto provides for the service of a summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute or order.

Other service.

(5) *Service by Publication; When Permitted; Effect; Manner; Proof.*

Service by
publication,
when permitted.

(a) *When Permitted.* A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to

jurisdiction acquired under subsections 5(a)(i), 5(a)(ii), and 5(a)(iii) herein.

Effect of service by publication.

(b) *Effect of Service by Publication.* When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

Filing of pleading and affidavit for service by publication.

(c) *Filing of Pleading and Affidavit for Service by Publication.* Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in 5(a) above; and (ii) upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained. Such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry.

Number of publications.

(d) *Number of Publications.* Service of the summons by publication may be made by publishing the same 3

times, once each week for 3 successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) *Mailing Summons and Complaint.* A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a foreign corporation whose charter has not expired or been forfeited, and personal service cannot be effected within Montana under the provisions of this rule, copy of the summons for publication and complaint shall be mailed to (i) the manager of the office of the principal place of business of the corporation, or if none, to one of the officers or directors of such corporation; or (ii) to an agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of said corporation; or (iii) if none of the persons mentioned herein can be found, then to the last known address of the corporation at its principal home office, if known, and also to the Secretary of State of the state of its incorporation. If the defendant is a foreign corporation whose charter or right to do business has expired or been forfeited, then copy of the summons for publication and complaint shall be mailed to one of the persons who have become trustees for the corporation and its stockholders or members, and, if none can be found, to the last known address of the corporation at its principal home office, if known, and also to the Secretary of State of the state of its incorporation.

Mailing summons and complaint.

(f) *Time When First Publication or Service Outside State Must Be Made.* The first publication of the summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any person not served within said 60-day period.

Time publication made.

(g) *When Service by Publication or Outside State Complete.* Service by publication is complete upon the

When service by publication complete.

expiration of 20 days after the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, upon the expiration of 20 days after the date of such service.

Additional
information
to be published.

(h) *Additional Information to Be Published.* In addition to the form of summons prescribed above in "*C. Process, (2) Same: Form*", the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

Service on
secretary of state.

(6) *Service on Secretary of State.* Unless otherwise provided by statute, whenever the Secretary of State of the State of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post office address of the person to be served, and shall file such affidavit with the clerk of the court in which such action is pending, accompanied by sufficient copies of such affidavit and of the summons and complaint for service upon the secretary of state, and the sum of three dollars to be paid to the secretary of state as a fee for the receipt of such service. The clerk shall forward three copies of the summons, complaint and affidavit, and the fee, to the sheriff of Lewis and Clark county for service on the secretary of state or his deputy by delivering thereto, and the sheriff shall make due return of such service.

Effect—Notice
and copy by
registered mail.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested", and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said

addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee. The date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered or certified mail was refused, shall be deemed to be the date of service, and the court in which the action is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action. As an alternative to sending the notice and summons and complaint by registered or certified mail, as here provided, the secretary of state may cause notice of the service and a copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) and (3) of this rule.

Alternative
procedure.

The secretary of state shall make an affidavit as to the service on him, and as to his mailing a copy of the summons and complaint and notice of such service, and as to the receipt of the return receipt or advice of the refusal of registered mail, and the respective dates thereof, and shall transmit such affidavit to the clerk of the court in which the action is pending, and it shall be filed in the cause. The secretary of state shall keep on file in his office a copy of the summons and complaint, and of his affidavit, and also keep a record which shall show the day and hour and manner of such service.

Affidavit
of service
and mailing by
secretary of state.

(7) *Amendment.* At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Amendment
of process or
proof of service.

(8) *Proof of Service.* Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

Proof of service.

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the time and place of service.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

Contents—
Affidavit of
service.

(9) *Contents of Affidavit of Service.* Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

Procedure where
all defendants
not served.

(10) *Procedure Where Only Part of Defendants Are Served.* If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

Section 5. Rule 5. **Service and filing of pleadings and other papers.**

Service—
when required.

(a) *Service: When Required.* Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Same: How Made.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Service—
how made.

(c) *Same: Numerous Defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

Service—
numerous
defendants.

(d) *Filing.* All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

Filing all
papers served.

(e) *Filing With the Court Defined.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Filing with
court defined.

(f) *Proof of Service.* Proof of service shall be made by an affidavit of the party or his attorney making service, or by the certificate of his resident attorney making service or by an acknowledgment in writing from the

party or attorney served, and such affidavit, certificate or acknowledgment shall be filed within 10 days after service. Failure to make proof of service does not affect the validity of the service.

Section 6. Rule 6. Time.

Computation of time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

Extension of time by court.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Time unaffected by term.

(c) *Unaffected by Expiration of Term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

5-day notice of hearing on motion.

(d) *For Motions—Affidavits.* A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period

is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

Affidavit served with motion.

(e) *Additional Time After Service by Mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Additional time after service by mail.

CHAPTER 3. PLEADINGS AND MOTIONS.

Section 7. Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.* There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Pleadings allowed.

(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Application for order made by motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) *Demurrers, Pleas, Etc., Abolished.* Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Demurrer abolished.

Section 8. Rule 8. General rules of pleading.

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim,

Form of pleading claims for relief.

cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Defenses—
form of denials.

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Pleading
affirmative
defenses.

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmative accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Effect of
failure to deny.

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a plead-

ing to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to Be Concise and Direct; Consistency.*

Pleading—
simple, concise,
direct.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motion are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Consistency of
claims and
defenses.

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

Construction
of pleadings.

Section 9. Rule 9. *Pleading special matters.*

Pleading special
matters: capacity
to sue or be sued.

(a) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fraud, mistake,
condition of mind.

(c) *Conditions Precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Conditions
precedent.

Official document,
act, ordinance,
statute.

(d) *Official Document, Act, Ordinance or Statute.* In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law. In pleading any ordinance or regulation of any county, city, village, or other political subdivision of this state, or any special, local or private statute, or any right derived therefrom, or the laws of another jurisdiction, it is sufficient to refer to the ordinance, regulation, statute or law by its title and the date of its passage, or by the appropriate designation in the official or recognized compilation thereof.

Judgment.

(e) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

Time and place.

(f) *Time and Place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

Special damage.

(g) *Special Damage.* When items of special damage are claimed, they shall be specifically stated.

Section 10. Rule 10. Form of pleadings.

Caption.

(a) *Caption; Names of Parties.* Every pleading shall contain a caption setting forth the name, district and county of the court, the title of the action, the number of the action, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Numbered
paragraphs.

(b) *Paragraphs; Separate Statements.* All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

Separate
statements.

(c) *Adoption by Reference; Exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Adoption by
reference,
exhibits.

Section 11. Rule 11. Signing of pleadings.

Signing
of pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Section 12. Rule 12. Defenses and objections—When and how presented—By pleading or motion—Motion for judgment on pleadings.

Defenses
and objections.

(a) *When Presented.* Except as otherwise provided by statute applicable to particular defendants or proceedings, the responsive pleadings shall be served as follows: A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, or within 20 days after the completion of service of process as provided in Rule 4, unless the court directs otherwise when service of process is made pursuant to Rule 4D(4). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order or such time as the order otherwise directs. Unless a different time is fixed by the court, when a motion permitted by these rules is served,

When presented.

the responsive pleading shall be served within 20 days after notice of the court's action if the court denies the motion or postpones its disposition until trial on the merits, and shall be served within 20 days after the service of the more definite statement if the court grants a motion for a more definite statement.

How presented.

Defenses
by motion.

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Motion for
judgment on
the pleadings.

(c) *Motion for Judgment on the Pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Preliminary
hearings.

(d) *Preliminary Hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether

made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Motion for more
definite statement.

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Motion to strike.

(g) *Consolidation of Defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

Consolidation
of defenses
in motion.

(h) *Waiver of Defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by sug-

Waiver
of defenses.

gestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

Section 13. Rule 13. Counterclaim and cross-claim.

Compulsory counterclaims.

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

Permissive counterclaims.

(b) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Effect of counterclaim.

(c) *Counterclaim Exceeding Opposing Claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

Counterclaim against state.

(d) *Counterclaim Against the State.* These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of Montana or any of its governmental subdivisions, agencies or officers.

Counterclaim after pleading.

(e) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

Counterclaim by amendment.

(f) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

Cross-claim against co-party.

(g) *Cross-Claim Against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-

party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) *Additional Parties May Be Brought in.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

Court shall order additional parties brought in.

(i) *Separate Trials; Separate Judgment.* If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

Separate trials; separate judgment.

Section 14. Rule 14. Third-party practice.

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and

When defendant may bring in third party.

Assertion of claims and defenses.

Motion on third party claim.

cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

When plaintiff may bring in third party.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Section 15. Rule 15. **Amended and supplemental pleadings.**

Amendment of pleadings.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Amendment to conform to evidence.

(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails

to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Relation back of amendments.

(d) *Supplemental Pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Supplemental pleadings.

Section 16. Rule 16. **Pre-trial procedure; formulating issues.**

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

Pre-trial conference.

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the

pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Pre-trial
calendar.

CHAPTER 4. PARTIES

Section 17. Rule 17. **Parties plaintiff and defendant; capacity.**

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State of Montana so provides, an action for the use or benefit of another shall be brought in the name of the State of Montana.

Real party
in interest.

(b) *Capacity to Sue or Be Sued.* The capacity of persons to sue or be sued shall be determined by appropriate statutory provisions.

Capacity
determined
by statute.

(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, or in any case where the court deems it expedient a guardian *ad litem* may be appointed to represent an infant or incompetent person, even though the infant or incompetent person may have a general guardian and may have appeared by him.

Infants or
incompetents.

Guardian ad litem.

Section 18. Rule 18. **Joinder of claims and remedies.**

(a) *Joinder of Claims.* The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

Joinder of claims.

(b) *Joinder of Remedies; Fraudulent Conveyances.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance carrier, unless such carrier is by law or contract directly liable to the person injured or damaged.

Joinder of
remedies;
fraudulent
conveyances.

Joinder of
insurance
carrier.

Section 19. Rule 19. **Necessary joinder of parties.**

(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

Necessary joinder
of parties.

(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to services of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to services of process can be acquired only by their

Effect of failure
to join.

consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

Pleading
non-joinder.

(c) *Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties but who are not joined, and shall state why they are omitted.

Section 20. Rule 20. Permissive joinder of parties.

Permissive
joinder.

(a) *Permissive Joinder.* All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Separate trials.

(b) *Separate Trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Section 21. Rule 21. Misjoinder and non-joinder of parties.

Effect of
misjoinder.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Any claim against a party may be severed and proceeded with separately.

Section 22. Rule 22. Interpleader.

Interpleader.

(a) *By Joinder, Cross-Claim or Counterclaim.* Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

Joinder—
when proper.

(b) *By Substitution.* A defendant against whom an action is pending upon a contract, or for specific real or personal property, at any time before answer, upon affidavit that a person not a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, may apply to the court for an order to substitute such person in his place and to discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court, in its discretion, may make the order.

Substitution
of defendants.

Section 23. Rule 23. Class actions.

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

Class
representation.

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Secondary action
by shareholders.

(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

Court approval—
dismissal or
compromise—
class action.

(c) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Court orders to
ensure adequate
representation.

(d) *Orders to Ensure Adequate Representation.* The court at any stage of an action under subdivision (a) of this rule may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment or of any other proceedings in the action, including notice to come in and present claims and defenses. When, notwithstanding such orders, the representation appears to the court inadequate fairly to protect the interests of absent parties, the court may, at any time prior to judgment, order an amendment of the pleadings, eliminating therefrom all reference to representation of the absent parties, and the court may order the entry of judgment in such form as to affect only the parties to the action and those adequately represented.

Section 24. Rule 24. **Intervention.**

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

Intervention
of right.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Permissive
intervention.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.

Procedure—
motion to
intervene.

Section 25. Rule 25. **Substitution of parties.**

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper

Motion for
substitution—
deceased party.

parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.

Survival and
abatement.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

After verdict
or judgment.

(3) After a verdict is rendered or an order for judgment is made in any action, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives by law, and substitution of parties shall be allowed as in other cases.

Incompetency.

(b) *Incompetency.* If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his guardian or may appoint a guardian *ad litem* for that purpose.

Transfer
of interest.

(c) *Transfer of Interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or join with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Substitution—
successor
in office.

(d) *Substitution of Successor to Public Officer.* When an officer of the state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when

it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the state. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If substitution is not made within a reasonable time, the action may be dismissed as to such public officer. When an officer of the class described herein may sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary.

Notice.

Dismissal.

CHAPTER 5. DEPOSITIONS AND DISCOVERY.

Section 26. Rule 26. *Depositions pending action.*

(a) *When Depositions May be Taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After the commencement of the action and service of process on any defendant the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained, if notice of the taking is served by the plaintiff within 20 days after such service of process. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

When and how
depositions taken.

(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and loca-

Scope of
examination.

Supplemental
pleading.

Discovery.

tion of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Examination and Cross-Examination.* Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b).

Use of depositions.

(d) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the State of Montana, unless it appears that the absence of the witness has been procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to intro-

duce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States, the State of Montana or of any other state, has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) *Objections to Admissibility.* Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying.

Objections to admissibility.

(f) *Effect of Taking or Using Depositions.* A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Effect of taking or using depositions.

Section 27. Rule 27. Depositions before action or pending appeal.

(a) *Before Action.*

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any district court of the State of Montana may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a district court of the State of Montana but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest there-

Petition for perpetuation of testimony.

in, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

Notice
and service.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for an order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served in the manner provided in Rule 4, and for persons not personally served in the manner provided in Rule 4D, who do not appear, an attorney shall be appointed who shall represent them and cross-examine the deponent. If an expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

Order and
examination.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

Use of
deposition.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules it may be used in any action involving the same subject matter subsequently brought in a district court of the State of Montana in accordance with the provisions of Rule 26(d).

(b) *Pending Appeal.* If an appeal has been taken from

Procedure:
deposition
pending appeal.

a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) *Perpetuation by Petition.* This rule does not limit the power of a court to entertain a proceeding to perpetuate testimony.

Power of court
not limited.

Section 28. Rule 28. **Persons before whom depositions may be taken.**

Persons before
whom depositions
may be taken
within the
United States.

(a) *Within the United States.* Within the State of Montana, depositions shall be taken before a person authorized by the laws of this state to administer oaths; without the state, but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this state, the United States, or of the place where the examination is held; within or without the State of Montana, depositions may also be taken before a person appointed by the court in which the action is pending, which persons so appointed shall have the power to administer oaths and take testimony.

(b) *In Foreign Countries.* In a foreign state or country depositions shall be taken (1) before a secretary of embassy or legation, consul, vice consul, or consular agent of the United States, or any officer authorized to admin-

In foreign
countries.

ister oaths under the laws of this state, or of the United States or (2) before a person appointed by the court. The officer or person is empowered to administer oaths and take testimony. A commission shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title.

Disqualification
for interest.

(c) *Disqualification for Interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Taking depositions
for use in
other states.

(d) *Depositions to be Used in Other States.* Whenever the deposition of any person is to be taken in this state pursuant to the laws of another state or the United States or of another country for use in proceedings there, the district court of the county where the witness is to be served, upon proof that notice has been duly served, may issue, pursuant to Rule 45(d), the necessary subpoenas.

Section 29. Rule 29. *Stipulations regarding the taking of depositions.*

Taking by
stipulation.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Section 30. Rule 30. *Depositions upon oral examination.*

Notice of
examination—
time and place.

(a) *Notice of Examination: Time and Place.* A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

Motions for orders
to protect parties
and deponents.

(b) *Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition

by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(e) *Record of Examination; Oath; Objections.* The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

Record of
examination;
oath; objections.

Written
interrogatories.

(d) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or in the event that the deposition is being taken in an action pending in another state or country, the dis-

Motion to
terminate
or limit
examination.

Resumption
or suspension.

Costs.

Deposition
submitted
to witness
for changing
and signing.Motion
to suppress.Certification and
filing by officer.

trict court in the county where the deposition is being taken, may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) *Submission to Witness; Changes; Signing.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and Filing by Officer; Copies; Notice of Filing.*

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or

send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) Upon receipt of a deposition the clerk of court shall open it and file it in the open file unless otherwise ordered. When the deposition is filed the clerk of court shall promptly give notice thereof to all parties.

(g) *Failure to Attend or to Serve Subpoena; Expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Section 31. Rule 31. Depositions of witnesses upon written interrogatories.

(a) *Serving Interrogatories; Notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

Copies.

Clerk of court
to file and
give notice.Effect of failure
to attend.Effect of failure
to serve subpoena.Written
interrogatories—
service and notice.

Copies to officer taking deposition.

(b) *Officer to Take Responses and Prepare Record.* A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(e), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

Clerk of court to file and give notice.

(c) *Filing and Notice.* Upon receipt of a deposition the clerk of court shall open it and file it in the open file unless otherwise ordered. When the deposition is filed the clerk of court shall promptly give notice thereof to all parties.

Motions for orders to protect parties and deponents.

(d) *Orders for the Protection of Parties and Deponents.* After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Effect of errors.

Section 32. Rule 32. Effect of errors and irregularities in depositions.

As to notice.

(a) *As to Notice:* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

As to disqualification of officer.

(b) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

As to taking of deposition.

(c) *As to Taking of Deposition.*

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

As to completion and return of deposition.

Section 33. Rule 33. Interrogatories to parties.

Written interrogatories to parties—service.

Any party may serve upon any adverse party, who has been served with process or who has appeared, written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 20 days after the service of interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 20 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Answers.

Objections.

Relation and use.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Section 34. Rule 34. Discovery and production of documents and things for inspection, copying or photographing.

Procedure for discovery and inspection.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Section 35. Rule 35. Physical and mental examination of persons.

Physical or mental examination of party.

(a) *Order for Examination.* In an action in which the mental or physical condition of a party is in contro-

versy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Findings.*

Report of findings.

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report he shall be deemed to be in contempt of court.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

Waiver of privilege.

Section 36. Rule 36. Admission of facts and of genuineness of documents.

(a) *Request for Admission.* After commencement of an action a party may serve upon any other party, who has been served with process or who has appeared, a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request, or of the truth of any relevant matters of fact set forth in the request. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 20 days after service thereof or within such shorter

Request for admission of documents.

Denials.

Written objections.

or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

Effect of admission.

(b) *Effect of Admission.* Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Section 37. Rule 37. Refusal to make discovery; consequences.

Procedure and effect on refusal to answer.

(a) *Refusal to Answer.* If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending, or if the deposition is being taken for use in an action pending in another state or country to the district court in Montana where the deposition is being taken, for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or

Costs and fees.

either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. In an action pending in the State of Montana, if the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) *Failure to Comply with Order.*

Contempt.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court so directing, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

Other consequences.

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

Matters established.

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

Exclusion of evidence.

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Stay, dismissal or default.

Arrest.

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

Costs and fees.

(c) *Expenses on Refusal to Admit.* If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

Effect of failure to attend or serve answers.

(d) *Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

CHAPTER 6. TRIALS

Section 38. Rule 38. Jury trial of right.

Right of trial by jury preserved.

(a) *Right Reserved.* The right of trial by jury as declared by the Constitution of the State of Montana or as given by a statute of the State of Montana shall be preserved to the parties inviolate.

Demand.

(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Specification of issues.

(c) *Same: Specification of Issues.* In his demand a

party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

Waiver.

(d) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Section 39. Rule 39. Trial by jury or by the court.

Trial by jury—when.

(a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Trial by court.

(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court upon motion or of its own initiative may on ten days' notice to the parties order a trial by a jury of any or all issues.

Advisory jury.

(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Trial by consent.

Section 40. Rule 40. Assignment of cases for trial.

Rule—
trial calendar.

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deem expedient. Precedence shall be given to actions entitled thereto by any statute of the State of Montana.

Section 41. Rule 41. Dismissal of actions.

Voluntary
dismissal.

(a) *Voluntary Dismissal: Effect Thereof.*

Notice.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the State of Montana, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

Stipulation.

Dismissal by
order of court.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Counterclaim.

Involuntary
dismissal.

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment

ment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) *Dismissal of Counterclaim, Cross-Claim, or Third Party Claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing.

Dismissal of
counterclaim,
cross-claim, or
third party claim.

(d) *Costs of Previously-Dismissed Action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Costs and stay
of proceedings.

Section 42. Rule 42. Consolidation; separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation.

(b) *Separate Trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Separate trials.

Section 43. Rule 43. Evidence.

(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. Either party, if he shall call as a wit-

Evidence.

Scope of
examination and
cross-examination.

ness in his behalf, the opposite party, an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, or any person who at the time of the happening of the transaction out of which the suit or proceeding grew, was an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, shall have the right to examine and cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true. The witness thus called may be contradicted and impeached by or on behalf of the opposite party, as well as by or on behalf of the party calling the witness, and may be examined by the opposite party upon the subject matter of his examination in chief, but any such examination by the opposite party shall be under the rules of direct examination unless the witness is unwilling or hostile with reference to the opposite party, in which case, the court may, in its discretion, allow the witness to be cross-examined.

Excluded
evidence—
offer of proof.

(c) *Record of Excluded Evidence.* In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

Affirmation
in lieu of oath.

(d) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

Evidence
on motions.

(e) *Evidence on Motions.* Except as otherwise pro-

vided in Rule 56, when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Section 44. Rule 44. **Proof of official record.**

(a) *Authentication of Copy.* An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

Authentication
of copy of
official record
or entry.

(b) *Proof of Lack of Record.* A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

Proof of lack of
official record.

(c) *Other proof.* This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

Other proof.

Section 45. Rule 45. **Subpoena.**

Subpoena.

(a) *For Attendance of Witnesses; Form; Issuance.* Every subpoena shall be issued by the clerk under the seal

For attendance
of witnesses;
form and issuance.

of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

For production
of documentary
evidence.

(b) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

Service.

(c) *Service.* A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service is made by exhibiting the original and delivering a true copy to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

Subpoena
for taking
depositions;
issuance.

(d) *Subpoena for Taking Depositions; Place of Examination.*

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a), or the presentation of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the clerk of the district court for the county in which the action is pending, or by the clerk of the district court for the county in which a deposition is being taken to be used in an action pending in another state or country, of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination per-

mitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45, except that if the action is pending out of the state, the court issuing the subpoena shall have the authority to enforce such rules.

(2) A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A non-resident of the state may be required to attend in any county of the state wherein he is served with a subpoena.

Residence.

(e) *Subpoena for a Hearing or Trial.* At the request of any party subpoenas for attendance at a hearing or trial shall be issued as provided by Rule 45(a), and such subpoenas for a hearing or trial in a district court may be served at any place within the state.

Subpoena
for hearing
or trial.

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Contempt.

Section 46. Rule 46. **Exceptions unnecessary.**

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Formal
exceptions
unnecessary.

Section 47. Rule 47. **Jurors.**

(a) *Examination of Jurors.* The court shall permit the parties or their attorneys to conduct the examination of prospective jurors under its supervision. The court may supplement the examination by such further inquiry as it deems proper. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

Jurors
examination.

Challenges
for cause
tried by court.

(b) *Manner of Selection and Order of Examination of Jurors.* From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Exam-

Initial panel.

Examination
by plaintiff.

Peremptory
challenges.

Additional jurors.

Clerk to
keep record.

Alternate jurors.

ination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant then striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of the original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which jurors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until a jury of twelve persons and the determined number of alternates shall remain to make up the trial jury.

(c) *Alternate Jurors.* The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall

take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by subdivision (b) of this rule. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

Section 48. Rule 48. **Juries—Verdict.**

At least two-thirds in number of any jury may render a verdict or finding, and such verdict or finding so rendered shall have the same force and effect as if all such jury concurred therein. The parties may stipulate that the jury shall consist of less number than twelve.

Two-thirds may
render verdict.

Section 49. Rule 49. **Special verdicts and interrogatories.**

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Special verdicts.

Written questions.

Instruction
by court.

Demand—
submission
of issue.

(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written in-

General verdict.

Written
interrogatories.

Instruction
by court.

Court to direct
entry of judgment.

Inconsistencies—
further
consideration
or new trial.

Motion for
directed verdict—
when made—
effect.

Reservation
of decision
on motion.

terrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Section 50. Rule 50. **Motion for a directed verdict.**

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judg-

ment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Section 51. Rule 51. **Instructions to jury; objection.**

The court may, during the trial or at the close of the evidence, request each of the parties to submit proposed written instructions on the law of the case. No party may assign as error the failure to instruct on any point of law unless he offers an instruction thereon. The court shall rule upon the proposed instructions and may prepare other written instructions to be given of its own motion and shall submit to the parties the instructions that will be given and provide opportunity to make objections. Objections made shall specify and state the particular grounds on which the instruction is objected to and it shall not be sufficient in stating the ground of such objection to state generally the instruction does not state the law or is against the law, but such ground of objection shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. All objections and rulings thereon shall be made out of the presence of the jury. No exceptions are necessary to the rulings of the court on the giving or the refusal of instructions. The court shall read to the jury the instructions given before the arguments of counsel are commenced.

Proposed
instructions.

Objections.

Grounds.

Rulings—
exceptions
unnecessary.

Court shall
read to jury.

Section 52. Rule 52. **Findings by the court.**

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. The findings of a master, to the extent that

Findings
by court—
effect.

Conclusions
of law.

Adoption
of findings
by master.

the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Amendment
of findings.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

Masters:
appointment,
compensation.

Section 53. Rule 53. Masters.

"Master" defined.

(a) *Appointment and Compensation.* Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

Reference.

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

Powers.

(c) *Powers.* The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the

order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) *Proceedings.*

Proceedings.

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte*, or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

Witnesses.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any

Statement
of accounts.

proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) *Report.*

Report of master.

Filing.

Transcript.
Clerk to
mail notice.

In non-jury
actions—
court to
accept findings.

Objections.

Hearing.

In jury actions—
findings
as evidence.

Stipulations
as to findings.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulations as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only

questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Draft of
master's report.

CHAPTER 7. JUDGMENT.

Judgment.

Section 54. Rule 54. **Judgments; costs.**

(a) *Definition; Form.* A judgment is the final determination of the rights of the parties in an action or proceeding and as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Definition.

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Judgment upon
multiple claims—
multiple parties.

(c) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Demand for
judgment.

(d) *Costs.* Except when express provision therefor is made either in a statute of the State of Montana or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State of Montana, its officers, agencies, and

Costs.

political subdivisions shall be imposed only to the extent permitted by law.

Default entry.

Section 55. Rule 55. Default.

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

Judgment by default.

(b) *Judgment.* Judgment by default may be entered as follows:

By clerk.

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person, and has been personally served, otherwise than by publication or personal service outside of this state.

By the court.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian *ad litem*, who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the State of Montana.

Setting aside entry of default.

(c) *Default; Setting Aside; Extension of Time by Court or Stipulation of Parties.* For good cause shown the court may set aside an entry of default and, if a judg-

ment by default has been entered, may likewise set it aside in accordance with Rule 60(b). No default of any party shall be entered, and no default judgment shall be entered against any party, except upon application of the opposing party. Before entering the default of any person who has been served outside the boundaries of the State of Montana, the court may, in its discretion, appoint a representative for any such person even though such person has not appeared. Any stipulation for extension of time between the parties or their counsel, whether in writing or made verbally before the court, shall be effective to extend the time for serving and/or filing any appearance, motion, pleading or proceeding, according to the terms of such stipulation. In any case if a party in default shall serve and file his appearance, motion, pleading or proceeding prior to application to the clerk for default, then such defaulting party shall not thereafter be considered in default as to that particular appearance, motion, pleading, or proceeding.

(d) *Plaintiffs, Counterclaimants, Cross-Claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(e).

Section 56. Rule 56. Summary judgment.

Summary judgment: for claimant.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move for a summary judgment in his favor as to all or any part thereof.

For defending party.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file

Motion and proceedings.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Affidavits shall not be considered for any purpose on motion for summary judgment. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Trial where case not fully adjudicated on motion.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Section 57. Rule 57. Declaratory judgments.

Procedure—
declaratory
judgment.

The procedure for obtaining a declaratory judgment pursuant to Sections 93-8901 to 93-8916, both inclusive, of the Revised Codes of Montana, 1947, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39, subject to the provisions of Section 93-8909, Revised Codes of Montana, 1947. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Section 58. Rule 58. Entry of judgment.

Clerk to enter
judgment as
court directs.

Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury

pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The entry of the judgment shall not be delayed for the taxing of costs.

Section 59. Rule 59. New trials; amendment of judgments.

New trial.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the State of Montana. On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

Grounds.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.

Time for motion

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

Affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

Court may order
new trial.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after service of notice of the entry of the judgment.

Motion to alter
or amend
judgment.

Section 60. Rule 60. Relief from judgment or order.

(a) *Clerical Mistakes.* Clerical mistakes in judgments,

Correction—
clerical mistakes.

orders or other parts of the record, and in pleadings, and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Grounds for relief from judgment.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be provided by law, or to set aside a judgment for fraud upon the court.

Section 61. Rule 61. Harmless error.

Harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Section 62. Rule 62. Stay of proceedings to enforce a judgment.

(a) *Stay of Proceedings to Enforce a Judgment—Stay Upon Entry of Judgment.* In a district court action, execution or other proceedings to enforce a judgment may issue immediately upon the entry of judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until the appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

Stay of proceedings on judgment.

(b) *Stay on Motion for New Trial or for Judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the district court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

Stay on motion.

(c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the district court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Injunction pending appeal.

(d) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Stay upon appeal.

Stay in favor
of state.

(e) *Stay in Favor of the State of Montana or Agency Thereof.* When an appeal is taken by the State of Montana or an officer or agency or governmental subdivision thereof, and the operation or enforcement of the judgment is stayed, no security shall be required from the appellant. In all cases, the parties may by written stipulation waive the filing of security.

Power of
appellate court
not limited.

(g) *Power of Appellate Court Not Limited.* The provisions in this rule do not limit any power of the Supreme Court of the State of Montana or of a justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Stay of
judgment—
multiple claims.

(h) *Stay of Judgment Upon Multiple Claims.* When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

CHAPTER 8. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS.

Section 63. Rule 64. **Seizure of person or property.**

Seizure of person
or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law.

Injunctions.

Section 64. Rule 65. **Injunctions.**

The procedure for granting restraining orders and temporary and permanent injunctions shall be as provided by statute.

Procedure—
receivers.

Section 65. Rule 66. **Receivers.**

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The prac-

tice in the appointment of and administration of estates by receivers or other similar officers shall be in accordance with the Montana statutes and with the practice heretofore followed in the courts of this state. In all other respects, the action in which the appointment of the receiver is sought or which is brought by or against a receiver is governed by these rules.

Section 66. Rule 67. **Deposit in court.**

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Chapter 45, Title 93, Revised Codes of Montana, 1947.

Deposit in court.

Section 67. Rule 68. **Offer of judgment.**

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

Offer of
judgment—
time for service.

Refusal.

Effect—costs.

Section 68. Rule 69. **Execution.**

The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of and supplementary to execution shall be in accordance with the statutes of the State of Montana. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of

Aid of execution.

Examination.

record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions.

Section 69. Rule 70. Judgment for specific acts; vesting title.

Judgment—
specific acts.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court may order the clerk to issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Vesting title.

Section 70. Rule 71. Process in behalf of and against persons not parties.

Process—
persons not parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

CHAPTER 9. APPEALS

Section 71. Rule 72. Appeal from a district court to the supreme court.

Appeals—
supreme court.

When an appeal is permitted by law from a district court to the Supreme Court of Montana, an appeal shall be taken, perfected, and prosecuted pursuant to the provisions of Chapter 80 of Title 93, Code of Civil Procedure,

Revised Codes of Montana, 1947, as amended, except to the extent that such provisions are superseded by Rule 62, and pursuant to the rules of the Supreme Court of Montana governing such an appeal.

CHAPTER 10. DISTRICT COURTS AND CLERKS.

Section 72. Rule 77. District courts and clerks.

(a) *District Courts Always Open.* The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

District courts
always open.

(b) *Trials and Hearings; Orders in Chambers.* All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.

Trials—
open court.

(c) *Clerk's Office and Orders by Clerk.* All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

Orders of clerk
subject to
court order.

(d) *Notice of Entry of Judgment Served.* Within 10 days after entry of judgment in an action in which an appearance has been made, notice of such entry, together with a copy of such judgment or a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon the adverse party.

Notice of entry
of judgment—
service.

Section 73. Rule 80. Stenographer; stenographic report or transcript as evidence.

Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Testimony
provable by
transcript.

CHAPTER 11. GENERAL PROVISIONS

Section 74. Rule 81. **Applicability in general.**

Excepted special proceedings.

(a) *Special Statutory Proceedings.* The statutory proceedings listed in Table A and any other special statutory proceeding, whether or not listed in Table A, are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules.

Appeals to district court.

(b) *Appeals to District Courts.* These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, but shall govern procedure and practice relating thereto insofar as these rules are not inconsistent with such statutes.

Rules incorporated into statutes.

(c) *Rules Incorporated into Statutes.* Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, insofar as practicable.

Section 75. Rule 82. **Jurisdiction and venue unaffected.**

Jurisdiction and venue not affected.

Except as provided in Rule 4 these rules shall not be construed to extend or limit the jurisdiction of the district courts of Montana or the venue of actions therein.

Section 76. Rule 83. **Rules by district courts.**

Rules—district courts.

Each district court, upon agreement of the judges or a majority thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules prescribed by the Supreme Court. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of this state. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Section 77. Rule 84. **Forms.**

Forms sufficient under rules.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the

simplicity and brevity of statement which the rules contemplate.

Section 78. Rule 85. **Title.**

These rules shall be known as the Montana Rules of Civil Procedure and may be cited as M. R. Civ. P. Title.

Section 79. Rule 86. **Effective date; statutes superseded.**

(a) *Effective Date and Application to Pending Proceedings.* These rules will take effect on January 1, 1962. They govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies. Effective date.

(b) *Statutes Superseded.* Upon the taking effect of these rules all statutes and parts of statutes in conflict herewith and the statutes listed in Tables B and C are superseded in respect of practice and procedure in the district courts. Statutes superseded.

Section 80. **Appendix of forms.**

Appendix of forms.

Form 1. SUMMONS—OFFICIAL FORM
IN THE DISTRICT COURT OF THE JUDICIAL
DISTRICT OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF.....

A. B.,		Plaintiff	} SUMMONS
	vs.		
C. D.,		Defendant	

The State of Montana to the above-named defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court, this

day of

E. F.

Attorney for Plaintiff,

.....
(Address)

..... Montana.

Form 2. COMPLAINT ON A PROMISSORY NOTE.

1. Defendant on or about June 1, 1958, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1959, the sum of dollars with interest thereon at the rate of per cent per annum].¹

¹ The pleader may use the material in one of the three sets of brackets. This choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 3. COMPLAINT ON AN ACCOUNT

Defendant owes plaintiff dollars according to the account hereto annexed as Exhibit A.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 4. COMPLAINT FOR GOODS SOLD AND DELIVERED.

Defendant owes plaintiff dollars for goods sold and delivered by plaintiff to defendant between June 1, 1959, and December 1, 1959.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Appendix
of forms—
continued.

Form 5. COMPLAINT FOR MONEY LENT.

Defendant owes plaintiff dollars for money lent by plaintiff to defendant on June 1, 1959, which is now due.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 6. COMPLAINT FOR MONEY PAID BY MISTAKE.

Defendant owes plaintiff dollars for money paid by plaintiff to defendant by mistake on June 1, 1959, under the following circumstances; (stating the circumstances with particularity. See Rule 9(b)).

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Form 7. COMPLAINT FOR MONEY HAD AND RECEIVED.

Defendant owes plaintiff ten thousand dollars for money had and received from one G. H. on June 1, 1959, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Form 8. COMPLAINT FOR NEGLIGENCE.

1. On June 1, 1959, in a public highway called State Street, in Helena, Montana, defendant negligently drove a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of dollars.

Wherefore plaintiff demands judgment against defendant in the sum of dollars and costs.

Form 9. COMPLAINT FOR NEGLIGENCE WHERE

Appendix
of forms—
continued.

PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE.

1. On June 1, 1959, in a public highway called State Street in Helena, Montana, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of.....dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of.....dollars and costs.

Form 10. COMPLAINT FOR CONVERSION.

On or about December 1, 1959, defendant converted to his own use ten bonds of the.....Company (inserting brief identification as by number and issue) of the value of.....dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of.....dollars, interest and costs.

Form 11. COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND.

1. On or about December 1, 1958, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

Appendix
of forms—
continued.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement; (2) damages in the sum of.....dollars; (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of.....dollars; and (4) judgment for costs.

Form 12. COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b).

1. Defendant C. D. on or about June 1, 1958, executed and delivered to plaintiff a promissory note (setting forth the note verbatim, or in substance and legal effect, or by annexing a copy, as in Form 2).

2. Defendant C. D. owes to plaintiff the amount of said note and interest.

3. Defendant C. D. on or about December 1, 1958, conveyed all his property, real and personal (or specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands judgment (1) against defendant C. D. for.....dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) for plaintiff's costs.

Form 13. COMPLAINT FOR NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C.A., §§51-58).

1. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at.....and known as Tunnel No.....

2. On or about June 1, 1958, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one

Appendix
of forms—
continued.

of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (describing plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earningdollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount ofdollars for medicine, medical attendance and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum ofdollars and costs.

Form 14. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF.

1. On or about June 1, 1956, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1956, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1956, was ever paid and the policy ceased to have any force or effect on July 1, 1956.

3. Thereafter, on September 1, 1956, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

5. Each of defendants C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and

effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

Appendix
of forms—
continued.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

Form 15. MOTION TO DISMISS.

The defendant moves the court as follows:

(1) To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

(2) To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds: (Here state reasons, such as (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Montana; (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B. respectively; (c) (etc.).)

Appendix
of forms—
continued.

.....
Attorney for Defendant

.....
Address

Notice of Motion

To:, Attorney for Plaintiff:

Please take notice, that the undersigned will bring the above motion for hearing before this court at the courtroom thereof in the Courthouse at, Montana, on the day of, 19, at o'clock M. or as soon thereafter as counsel can be heard.

.....
Attorney for Defendant

.....
Address

Form 16. ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen and resident of the State of Montana; is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party, but has not been made one.

THIRD DEFENSE

Defendant admits the allegation(s) contained in paragraph(s) of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph(s) of the complaint; and denies each and every other allegation contained in the complaint.

FOURTH DEFENSE

The right of action set forth in the complaint did not

accrue within years next before the commencement of this action, and is therefore barred by the provisions of section (setting forth the particular section or subsection applicable thereto).

Appendix
of forms—
continued.

COUNTERCLAIM

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

CROSS-CLAIM AGAINST DEFENDANT M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.)

Form 17. ANSWER TO COMPLAINT SET FORTH IN FORM 7, WITH COUNTERCLAIM FOR INTERPLEADER.

DEFENSE

Defendant denies the allegations of the complaint to the extent set forth in the counterclaim herein.

COUNTERCLAIM FOR INTERPLEADER

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.
2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.
3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

- (1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.
- (2) That the court order the plaintiff and E. F. to interplead their respective claims.
- (3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.
- (4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

Appendix
of forms—
continued.

(5) That the court award to the defendant its costs and attorney's fees.

Form 18. SUMMONS AND THIRD-PARTY COMPLAINT — INTERPLEADER.

A. B.,	Plaintiff,	} THIRD PARTY SUMMONS Civil No.
vs.		
C. D.,	Defendant,	
and Third-Party Plaintiff,		
vs.		
E. F.,	Third-Party Defendant.	

The State of Montana to the Above-Named Third-Party Defendant:

You are hereby summoned to answer the third-party complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney and upon the attorney for defendant and third-party plaintiff within twenty days after the service of this third-party summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the third-party complaint.

Witness my hand and the seal of said court, this..... day of.....

.....
Clerk of the District Court

(COURT SEAL)

G. H.

Attorney for Defendant
and Third-Party Plaintiff

.....
(Address)

....., Montana

The name and address of the
attorney for Plaintiff is:

J. K.

.....
(Address)

....., Montana

Appendix
of forms—
continued.

A. B.,	Plaintiff,	} THIRD PARTY COMPLAINT Civil No.
vs.		
C. D.,	Defendant,	
and Third-Party Plaintiff,		
vs.		
E. F.,	Third-Party Defendant.	

1. Plaintiff A. B. has filed against defendant C. D., a complaint, a copy of which is hereto attached as Exhibit C.

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for.....dollars and for costs.

.....
Attorney for Third-Party Plaintiff

.....
(Address)

Form 19. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24.

A. B.,	Plaintiff,	} MOTION TO INTERVENE AS A DEFENDANT Civil No.
vs.		
C. D.,	Defendant,	
E. F.,	Applicant for Intervention	

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the grounds (here set forth generally the grounds upon which intervention is sought, in accordance with the right of intervention contained in Rule 24) and as such as a defense to plaintiff's claim presenting (setting forth whether the same relates to questions of law or fact, or both) which are common to the main action.

.....
Attorney for E. F., Applicant for Intervention

.....
(Address)

Appendix
of forms—
continued.

NOTICE OF MOTION

(Contents the same as those in Form 15, or notice and motion may be combined in a notice of motion as provided in Rule 7(b).)

INTERVENOR'S ANSWER

(Set forth defenses in accordance with the outline contained in Form 16)

Form 20. MOTION FOR PRODUCTION, ETC.,
UNDER RULE 34.

Plaintiff A. B. moves the court for an order requiring defendant C. D.:

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

[Here list the documents and describe each of them]

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

[Here list the objects and describe each of them]

(3) To permit plaintiff to enter [here describe property to be entered] and to inspect and to photograph [here describe the portion of the real property and the objects to be inspected and photographed].

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

.....
Attorney for Plaintiff

.....
Address

EXHIBIT A

STATE OF MONTANA

County of Lewis and Clark

A. B., being first duly sworn says:

Appendix
of forms—
continued.

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above mentioned items is relevant to some issue in the action.)

A. B. (Signed)

(Jurat)

Form 21. REQUEST FOR ADMISSION UNDER
RULE 36

Plaintiff A. B. requests defendant C. D. within days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

[Here list the documents and describe each document.]

2. That each of the following statements is true. [Here list the statements.]

.....
Attorney for Plaintiff

.....
Address

Form 22. ALLEGATION OF REASON FOR OMIT-
TING NECESSARY PARTY.

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; or [for reasons stated].

Section 81. Table A. **Special statutory proceedings under Rule 81.**

Special statutory
proceedings.

Following is a list of sections of the Revised Codes of Montana, 1947, as amended, pertaining to special proceedings which are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules:

Review of beer license, revocation, suspension or
denial4-342

Special statutory
proceedings—
continued.

Review of liquor license revocation, suspension, or denial	4-425
Closed bank proceedings	5-1107
Review of decision of Superintendent of Banks	5-1108
Appeal from decision of Superintendent of Banks	5-1112
Closed banks, procedure for disposition of assets	5-1118
Appointment of trustee of cemetery association	9-121
Removal of dedication of property for cemetery....	9-816, 9-817
Proceedings re dependent and neglected chil- dren	Title 10, Ch. 5
Juvenile courts	Title 10, Ch. 6
Appeal from city approval of emergency expendi- tures	11-1409
Appeal from appraisal of damage to land- owner caused by change of grade of street or sidewalk	11-2604, 11-2605
Review of decision of municipal board of adjust- ment re zoning regulations	11-2707
Determination of title to lots in entry town- sites	11-3014, 11-3026
Formation of agricultural or co-operative corpo- rations or districts	14-302 to 14-304
Creation of indebtedness of same	14-319, 14-320
Lost or destroyed stock certificates	15-644
Dissolution of corporations	15-1108 to 15-1114
Assignments for benefit of creditors	18-314 to 18-326
Contesting nominations	23-926 to 23-928
Recount of votes	23-2301 to 23-2304
Appeal from revocation of oleomargarine license....	27-517
Appeal from revocation of driver's license	31-152
Appraisal of homestead subject to execu- tion	33-109 to 33-123
Insane, examination and commitment	38-201 to 38-214
Same, voluntary	38-401 to 38-412
Eugenical sterilization law	38-606
Inebriates, commitment	38-701 to 38-711
State Training School, commitment to	38-801 to 38-819
Senile aged, commitment	38-1101 to 38-1112
Insurance Code effective January 1, 1961:	
Appeals from Commissioner of Insurance	40-2725
Service of process	40-2818, 40-2819
Unauthorized insurers—service of process, defense of actions, attorneys' fees.....	40-3403 to 40-3408

Special statutory
proceedings—
continued.

Surplus lines, service of process	40-3423, 40-3424
Prohibited or undefined trade practices—in- junction proceedings, and appeals from Com- missioner's report	40-3514, 40-3515
Appeals from decisions of Commissioner of In- surance respecting rates and rating organi- zations	40-3633
Delinquency proceedings against insurance companies	40-5101 to 40-5133
Fraternal benefit societies, service of process	40-5352
Fraternal benefit societies, injunction and quo warranto proceedings	40-5356, 40-5357
Grazing district appeal procedure	46-2308
State Mine Inspector, procedure for investigation of charges of neglect of duty	50-410
Review of order of Montana Trade Commission	51-113
Appeal from decision of Highway Patrol Super- visor	53-419
Review of Orders of Oil and Gas Conservation Commission	60-135
Uniform Adoption Act	61-201 to 61-217
Appeal from decision of Board of Medical Exam- iners	66-1004
Review of order of Board of Pharmacy	66-1509
Commitment to State Tuberculosis Hospital.....	69-307 to 69-310 and 69-313
Establishing birth	69-522
Review of decision of Board of Health or Water Pollution Council	69-1335
Review of actions of Public Service Commission	70-128
Review of action of Board of Railroad Commis- sioners	72-125
Review of school trustees' resolution to sell school property	75-1634
Compulsory attendance at school	75-2901
State Industrial School, commitment	75-3001, 75-3002
State Industrial School	80-810 and 80-815 to 80-817
State Vocational School, commitment	80-918 to 80-921
Female reformatories, commitment	80-1002, 80-1003
Proceedings to abate fire hazards	82-1219 to 82-1222
Appeal from decision of Commissioner of Agri- culture	84-3410 to 84-3412
Action to confirm tax deed	84-4144 to 84-4150
Action to quiet title to tax deed property	84-4158

Special statutory
proceedings—
continued.

Action to procure tax deed	84-4162 to 84-4169
Complaint in action to collect taxes by suit	84-4302
Cigarette tax appeal	84-5617
Administration of trusts	86-315 to 86-326
Review of order of Unemployment Compensation Commission	87-108
Insecure dams	89-702 to 89-714
Creation of irrigation districts	89-1201 to 89-1204
Irrigation districts—changing boundaries, cor- recting errors, fixing taxable acreage, etc.	Title 89, Ch. 14
Confirmation of resolution authorizing bonds for irrigation district	89-1704
Dissolution of irrigation districts	89-2001 to 89-2008
Irrigation districts, appeals	89-2101, 89-2102
Drainage districts, creation	Title 89, Ch. 22
Drainage districts, commissioners	Title 89, Ch. 23
Proceedings to alter or add to drainage dis- trict	Title 89, Ch. 27
Miscellaneous provisions respecting drainage dis- tricts	Title 89, Ch. 28
Escheated estate proceedings	91-515 to 91-518
Procedure to obtain authority to mortgage, lease, or sell part of estate	Title 91, Ch. 31
Determination of heirship	91-3801 to 91-3803
Termination of life estate or joint tenancy	91-4321
Appointment of guardians of minors	91-4601
Appointment of guardians of insane and incom- petent persons	91-4701, 91-4702
Restoration to capacity	91-4704
Uniform Veterans' Guardianship Act	Title 91, Ch. 48
Procedure to mortgage or lease by guardians	91-4911
Property sale by guardians	91-5005 to 91-5013
Guardians of nonresidents	Title 91, Ch. 51
Examination and removal of guardians, etc.	91-5201, 91-5202
Proceedings supplementary to execution	93-5901 to 93-5913
Quiet title (including actions to establish title to property granted to heirs of deceased entry- men)	93-6201 to 93-6239
Partition of property	93-6301 to 93-6360
Certiorari	93-9001 to 93-9011
Mandamus	93-9101 to 93-9114
Prohibition	93-9201 to 93-9204

Special statutory
proceedings—
continued.

Provisions applicable to certiorari, mandamus, and prohibition	93-9301 to 93-9303
Eminent domain	93-9901 to 93-9926
Change of name	93-100-1 to 93-100-9
Judicial determination of birth	93-101-1 to 93-101-6
Arbitration	93-201-1 to 93-201-10
Bastardy proceedings	94-9901 to 94-9908
Habeas corpus	94-101-1 to 94-101-33
Uniform Reciprocal Enforcement of Support Act	94-901-1 to 94-901-18

Section 82. Table B. List of rules superseding statutes.

Rules superseding
statutes.

Rule	Statutes Superseded (R.C.M. 1947, sections)
4	93-2816, 93-3006, 93-3007, 93-3013, 93-3014, 93-3015
4 (with Rule 12(a))	93-3003
4D(9), (10)	93-3018
4D(11)	93-3017
5	93-3819, 93-8501, 93-8502, 93-8503, 93-8507
5 (with Rule 6(e))	93-8504
6(b) (with Rules 15(a), 55(e), 60)	93-3905
6(d) and (e)	93-8403
6(e) (with Rule 5)	93-8504
7(a)	93-3101, 93-3102, 93-3103, 93-3201, 93-3601, 93-3603
7(b)	93-8401
7(c)	93-3301, 93-3302, 93-3303, 93-3306, 93-3501, 93-3502, 93-3503, 93-3504, 93-3505, 93-3506, 93-3604, 93-3907, 93-4902
8(a)	93-3202, 93-3412, 93-3808, 93-3812
8(b)	93-3401(1), 93-3410, 93-3411, 93-3813, 93-3816
8(c)	93-3401(2)
8(d)	93-3815, 93-3817, 93-4904
8(e) (1)	93-3202(2)
8(e) (2)	93-3410, 93-3602
8(f)	93-3801, 93-3909
9(a)	93-3301(2), 93-3505(2)
9(c)	93-3807
9(d)	93-3811

CHAPTER 13

SESSION LAWS

Rules superseding
statutes—
continued.

9(e)	93-3806
10(a)	93-3202(1)
10(b)	93-3410, 93-3602
10(c)	93-3820
11	93-3701
12(a) (with Rule 4)	93-3003
12(b)	93-2905, 93-3301, 93-3305, 93-3501, 93-3502, 93-3504, 93-3505, 93-3506, 93-3604, 93-4902
12(e)	93-3301(7)
12(f)	93-3802, 93-3803
12(h)	93-3306
13(a)	93-3408
13(b)	93-3402
13(c)	93-3402, 93-3404, 93-3405, 93-5703
13(g)	93-3415
14(a)	93-3415
15(a)	93-3304, 93-3904
15(a) (with Rules 6(b), 55(c), 60)	93-3905
15(b)	93-2303, 93-3901, 93-3902, 93-3903, 93-3909
15(d)	93-3818
17(a)	93-2801
17(b)	93-2805
18(a)	93-3203
19(a)	93-2821
19(b)	93-2828
20(a)	93-2811, 93-2812, 93-2818, 93-2822
20(b)	93-4906
22	93-2825
23	93-2821
24	93-2826, 93-2828
25	93-2824
26 to 32, inclusive	93-1801-1 to 93-1801-16, inclusive
26(a)	93-1801-2, 93-1801-3
26(b)	93-1801-2, 93-1801-3, 93-1801-4
26(c)	93-1801-10
26(d) (2)	93-1801-8
26(d) (3)	93-1801-3, 93-1801-10
26(d) (5)	93-1801-12
26(e)	93-1801-10
27(a)	93-2301-1 to 93-2301-7, inclusive
28(a)	93-1801-4, 93-1801-9
28(b)	93-1801-4

THIRTY-SEVENTH LEGISLATIVE ASSEMBLY

CHAPTER 13

Rules superseding
statutes—
continued.

28(d)	93-1801-13, 93-1801-14, 93-1801-15
29	93-1801-4, 93-1801-5, 93-1801-10
30(a)	93-1801-4, 93-1801-9
30(c)	93-1801-6, 93-1801-10
30(e)	93-1801-10, 93-1801-11
30(f) (1)	93-1801-6, 93-1801-10
31(a)	93-1801-5
31(b)	93-1801-5, 93-1801-6
31(d)	93-1801-5
32(a)	93-1801-11
32(b)	93-1801-11
32(c) (1)	93-1801-10
32(c) (2)	93-1801-10
32(c) (3)	93-1801-5
34	93-8301
38(d)	93-5301
39(a)	93-4905
39(b)	93-4905, 93-5301
40	93-4908, 93-4909
41(a) (1)	93-4705(1), (2)
41(b)	93-4705(3), (4), (5), 93-4708
42(a)	93-8705
42(b)	93-4906
43(b)	93-1901-9
45(c)	93-1501-5
46	93-5502
47(a)	93-5012
47(b)	93-5013, 93-5014
49	93-5111, 93-5201, 93-5202
51	93-5101(5)
52(a)	93-5303, 93-5411
53(a)	93-5403, 93-5407, 93-8607
53(b)	93-5401, 93-5402
53(c)	93-5401, 93-5402, 93-5406, 93-5407
53(d)	93-5405, 93-5406, 93-5410
53(e)	93-5410, 93-5411, 93-5412
54(a)	93-4701
54(b)	93-4703
54(c)	93-4704
54(d)	93-4709
55(a)	93-4801(1), (2)
55(b) (1)	93-4801(1)
55(b) (2)	93-4120, 93-4801(2), (3), (4)
55(c) (with Rules 6(b), 15(a), and 60)	93-3905

55(d)	93-3603
58	93-5701
59(b), (c)	93-5605
60 (with Rules 6(b), 15(a), and 55(c))	93-3905
61	93-3909
62(d)	93-8007, 93-8008, 93-8009, 93-8010
68	93-8201

Statutes superseded
by rules.

Section 83. Table C. List of statutes superseded by rules.

Statutes Superseded (R.C.M. 1947, sections)	Rules
93-2303	15(b)
93-2801	17(a)
93-2805	17(b)
93-2811	20(a)
93-2812	20(a)
93-2816	4
93-2818	20(a)
93-2821	19(a), 23
93-2822	20(a)
93-2824	25
93-2825	22
93-2826	24
93-2828	19(b), 24
93-2905	12(b)
93-3003	4 and 12(a) together
93-3006	4
93-3007	4
93-3013	4
93-3014	4
93-3015	4
93-3017	4D(11)
93-3018	4D(9), (10)
93-3101	7(a)
93-3102	7(a)
93-3103	7(a)
93-3201	7(a)
93-3202	8(a)
93-3202(1)	10(a)
93-3202(2)	8(e) (1)
93-3203	18(a)
93-3301	7(c), 12(b)
93-3301(2)	9(a)

93-3301(7)	12(e)
93-3302	7(c)
93-3303	7(c)
93-3304	15(a)
93-3305	12(b)
93-3306	7(c), 12(h)
93-3401(1)	8(b)
93-3401(2)	8(c)
93-3402	13(b), 13(c)
93-3404	13(c)
93-3405	13(c)
93-3408	13(a)
93-3410	8(b), 8(e) (2), 10(b)
93-3411	8(b)
93-3412	8(a)
93-3415	13(g), 14(a)
93-3501	7(c), 12(b)
93-3502	7(c), 12(b)
93-3503	7(c)
93-3504	7(c), 12(b)
93-3505	7(c), 12(b)
93-3505(2)	9(a)
93-3506	7(c), 12(b)
93-3601	7(a)
93-3602	8(e) (2), 10(b)
93-3603	7(a), 55(d)
93-3604	7(c), 12(b)
93-3701	11
93-3801	8(f)
93-3802	12(f)
93-3803	12(f)
93-3806	9(e)
93-3807	9(e)
93-3808	8(a)
93-3811	9(d)
93-3812	8(a)
93-3813	8(b)
93-3815	8(d)
93-3816	8(b)
93-3817	8(d)
93-3818	15(d)
93-3819	5
93-3820	10(c)
93-3901	15(b)

Statutes superseded
by rules—
continued.

Statutes superseded by rules— continued.	93-3902	15(b)
	93-3903	15(b)
	93-3904	15(a)
	93-3905	6(b), 15(a), 55(c), and 60 together
	93-3907	7(c)
	93-3909	8(f), 15(b), 61
	93-4120	55(b) (2)
	93-4701	54(a)
	93-4703	54(b)
	93-4704	54(c)
	93-4705(1), (2)	41(a) (1)
	93-4705(3), (4), (5)	41(b)
	93-4708	41(b)
	93-4709	54(d)
	93-4801(1)	55(a), 55(b) (1)
	93-4801(2)	55(a), 55(b) (2)
	93-4801(3)	55(b) (2)
	93-4801(4)	55(b) (2)
	93-4902	7(c), 12(b)
	93-4904	8(d)
	93-4905	39(a), 39(b)
	93-4906	20(b), 42(b)
	93-4908	40
	93-4909	40
	93-5012	47(a)
	93-5013	47(b)
	93-5014	47(b)
	93-5101(5)	51
	93-5111	49
	93-5201	49
	93-5202	49
	93-5301	38(d), 39(b)
	93-5303	52(a)
	93-5401	53(b), 53(c)
	93-5402	53(b), 53(c)
	93-5403	53(a)
	93-5405	53(d)
	93-5406	53(c), 53(d)
	93-5407	53(a), 53(c)
	93-5410	53(d), 53(e)
	93-5411	52(a), 53(e)
	93-5412	53(e)
	93-5502	46
	93-5605	59(b), (c)

93-5701	58
93-5703	13(c)
93-8007	62(d)
93-8008	62(d)
93-8009	62(d)
93-8010	62(d)
93-8201	68
93-8301	34
93-8401	7(b)
93-8403	6(d) and (e)
93-8501	5
93-8502	5
93-8503	5
93-8504	5 and 6(e) together
93-8507	5
93-8607	53(a)
93-8705	42(a)
93-1501-5	45(c)
93-1801-1 to 93-1801-16, inclusive	26 to 32, inclusive
93-1801-2	26(a), 26(b)
93-1801-3	26(a), 26(b), 26(d) (3)
93-1801-4	26(b), 28(a), 28(b), 29, 30(a)
93-1801-5	29, 31(a), 31(b), 31(d), 32(c) (3)
93-1801-6	30(c), 30(f) (1), 31(b)
93-1801-8	26(d) (2)
93-1801-9	28(a), 30(a)
93-1801-10	26(c), 26(d), (3) 26(e), 29, 30(e), 30(e), 30(f) (1), 32(c) (1), 32(c) (2)
93-1801-11	30(e), 32(a), 32(b)
93-1801-12	26(d) (5)
93-1801-13	28(d)
93-1801-14	28(d)
93-1801-15	28(d)
93-1901-9	43(b)
93-2301-1 to 93-2301-7, inclusive	27(a)

Statutes superseded
by rules—
continued.

Section 84. That section 93-2303; section 93-2801; section 93-2805; section 93-2811; section 93-2812; section 93-2816; section 93-2818; section 93-2821; section 93-2822; sections 93-2824 through 93-2826; section 93-2828; section 93-2905; section 93-3003; section 93-3006; section 93-3007; sections 93-3013 through 93-3015; section 93-3017; section 93-3018; sections 93-3101 through 93-3103; sections 93-3201 through 93-3203; sections 93-3301 through 93-3306; section 93-3401; section 93-3402; section 93-3404;

Sections repealed.

Sections repealed—
continued.

section 93-3405; section 93-3408; sections 93-3410 through 93-3412; section 93-3415; sections 93-3501 through 93-3506; sections 93-3601 through 93-3604; section 93-3701; sections 93-3801 through 93-3803; sections 93-3806 through 93-3808; sections 93-3811 through 93-3813; sections 93-3815 through 93-3819; section 93-3820 as amended by chapter 16, Laws of Montana, 1953; sections 93-3901 through 93-3905; sections 93-3907; section 93-3909; section 93-4120; section 93-4701; sections 93-4703 through 93-4705; section 93-4708; section 93-4709; section 93-4801; section 93-4902; section 93-4904; section 93-4905 as amended by chapter 84, Laws of Montana, 1949; section 93-4906; section 93-4908; section 93-4909; sections 93-5012 through 93-5014; subsection (5) of section 93-5101; section 93-5111; section 93-5201; section 93-5202; section 93-5301; section 93-5303; sections 93-5401 through 93-5403; sections 93-5405 through 93-5407; sections 93-5410 through 93-5412; section 93-5502; section 93-5605; section 93-5701; section 93-5703; section 93-8007 as amended by chapter 75, Laws of Montana, 1959; sections 93-8008 through 93-8010; section 93-8201; section 93-8301; section 93-8401; section 93-8403; sections 93-8501 through 8504; section 93-8507; section 93-8607; section 93-8705; section 93-1501-5; sections 93-1801-1 through 93-1801-3; section 93-1801-4 as amended by chapter 9, Laws of Montana, 1953; sections 93-1801-5 through 93-1801-16; section 93-1901-9; sections 93-2301-1 through 93-2301-7, and all acts and parts of acts in conflict herewith are hereby repealed.

Approved February 9, 1961.

CHAPTER 14

An Act to Amend Section 82-2002 of the Revised Codes of Montana, 1947, Relating to the Duties of the Reporters of the Decisions of the Supreme Court; and to Amend Section 82-2004 of the Revised Codes of Montana, 1947, Relating to Contracts for Publication of the Montana Reports by Providing That the Reporters Shall Make Careful and Accurate Reports of the Cases Decided Pursuant to Rules and Regulations Promulgated by the Justices of the Supreme Court; and That the Contract for Publication of Such Reports Shall Be for any Term

of Years Agreeable to the Justices, Provided That Such Term Shall Not Exceed Six (6) Years Nor Be for Less Than One (1) Year, and Deleting the Requirement for a Six (6) Year Contract.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That section 82-2002, Revised Codes of Montana, 1947, be, and the same is hereby amended to read as follows:

Amending clause.

“82-2002. (379) **Duties of reporters.** The reporters of the decisions of the supreme court shall make careful and accurate reports of the cases decided by the supreme court. *The reports of such cases shall be made under the supervision of, and pursuant to rules and regulations promulgated by the justices of the supreme court.*

Rules of supreme court govern reports of decisions.

Section 2. That section 82-2004, Revised Codes of Montana, 1947, be, and the same is hereby amended to read as follows:

Amending clause.

“82-2004. (381) **Contract with publisher.** The justices shall have no pecuniary interest in the volumes of reports. The reports must be published by contract to be entered into by the justices and with the publishing house that will agree to publish the new volumes of the Montana reports for any term of years agreeable to the justices, provided that such term shall not exceed six (6) years, nor be for less than one (1) year, and furnish to the state and the people of the state at prices fixed in the contract any volume or volumes printed by such publishers. In the contract the justices may, at their discretion, require the publisher to agree to furnish complete sets or odd volumes of the Montana reports from and including volume one to the last volume published, to the state and the people of the state at prices fixed in the contract. Such contract shall require the publisher to print each volume in accordance with the specifications set forth in the preceding section. It shall also require the publisher to issue each new volume within ninety (90) days after the manuscript for the same is delivered by the justices to the said publisher. Such contract shall also require the publisher to make stereotype matrices of each volume so published by him, and to preserve these matrices in fire proof vaults, to the end that the volumes will never become out of print. The publisher receiving the contract as herein provided shall, before

Reports to be published under contract not to exceed 6-year term.

Other terms of contract.

Publisher to advertise in state.